No. 91-543; 91-558; 91-563

In The

Supreme Court Of The United States

October Term, 1991

THE STATE OF NEW YORK,
Petitioner

v.

THE UNITED STATES OF AMERICA;
JAMES D. WATKINS, as Secretary of Energy;
KENNETH M. CARR, as Chairman of the United States Nuclear Regulatory Commission;
THE UNITED STATES NUCLEAR REGULATORY COMMISSION;
SAMUEL K. SKINNER, as Secretary of Transportation; and
WILLIAM P. BARR, as United States Attorney General,
Respondents

The State of Washington; The State of Nevada; and The State of South Carolina,
Intervenor-Respondents

On Writs of Certiorari to the
U.S. Court of Appeals for the Second Circuit

BRIEF OF THE STATE OF CONNECTICUT AS AMICUS CURIAE IN SUPPORT OF PETITIONER STATE OF NEW YORK

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INTEREST OF THE AMICUS CURIAE

Following Congress' lead "to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes . . ." (42 U.S.C. §2013(d)), the U.S. Nuclear Regulatory Commission (NRC) licensed and continues to regulate the radioactive hazard of four nuclear powered generating stations in Connecticut. These nuclear power plants are co-owned by a consortium of private, investor owned utility companies located in different states. They provide electricity on an interstate basis to all of New England.

A by-product of the nuclear generation of electrical energy is nuclear waste – high-level radioactive waste and low-level radioactive waste. The federal government has accepted responsibility for the disposal of high-level radioactive waste and low-level radioactive waste above Class C. Congress, however, through the Low-level Radioactive Waste Policy Amendments Act of 1985 (the "1985 Amendments") has imposed on the States the responsibility for disposing of all Class A, B and C low-level radioactive waste generated within their borders. 42 U.S.C. §2021b *et seq.* The low-level radioactive waste generated by the nuclear power plants located in Connecticut accounts for almost all of the low-level radioactive hazard in this State.[1]

Under the 1985 Amendments, Connecticut is now responsible for the disposal of all Class A, B and C low-level radioactive waste created by the generation of electricity within the State by privately owned utility companies which distribute electricity on an interstate basis. The State is also responsible for the disposal of low-level radioactive waste produced by private radioactive waste generators located in Connecti-

[1] Nuclear generating plants account for 99.9 percent of the low-level radioactive hazard in Connecticut. *Low-Level Radioactive Waste Management in Connecticut – 1990*, Figure 2-1, p. A-11 (1992) Connecticut Hazardous Waste Management Service.

cut and certain low-level radioactive waste created by the federal government.[2]

If Connecticut fails to provide disposal capacity for all of the above-mentioned waste by January 1, 1996, the 1985 Amendments Act requires the State to take title and possession of all low-level radioactive waste generated within Connecticut or assume liability for damages generators incur as a result of the State's failure to dispose of such waste.[3] The States may neither preclude, limit nor regulate the generation of low-level radioactive waste by these private entities.

The 1985 Amendments thus imposed a tremendous economic and political burden on the State of Connecticut forcing it to mobilize all of its sovereign powers to implement the Act's requirements. The State's Legislature has enacted a series of laws to implement the federal low-level radioactive waste mandates.[4] The agencies of the Executive branch have promulgated extensive regulations to enable them to oversee and administer the project.[5] The Connecticut Hazardous Waste Management Service, the State authority charged with siting low-level radioactive waste disposal facilities, has already

[2] The States generate a minimal amount of low-level radioactive waste at state-owned hospitals and universities. For example, the State of Connecticut generated only seven-tenths of one percent of the total volume of low-level radioactive waste generated in the State and only one-thousandth of one percent of the radioactive hazard. *Low-Level Radioactive Waste Management in Connecticut – 1990*, p. A-8, Table 2-5 (1992) Connecticut Hazardous Waste Management Service.

[3] The States of Connecticut and New Jersey are the only two members of the Northeast Compact. With one vote each, Connecticut and New Jersey will host their own facilities in each State.

[4] Conn. Gen. Stat. 22a-134bb, 22a-134ff, 22a-137, 22a-161, 22a-163, 22a-163a-w, 22a-164, 22a-165, and 22a-165a-f.

[5] Regulations of Connecticut State Agencies (proposed) Sections 22a-163f-100 through 22a-163f-107 and 22a-163o-1. See also Regulations of Connecticut State Agencies 22a-163f-1 through f-10, 22a-163l-1 and 22a-163t.

begun the monumental project of complying with Congress' fiat that the States must dispose of low-level waste.[6]

The Attorney General of Connecticut supervises the provision of legal counsel to the Hazardous Waste Management Service on the myriad laws and regulations that are involved in implementing this Act. The judicial system in Connecticut may be required to condemn residential and agricultural land for the facility and will further be strained as the State may be obliged to sue its own citizens – adjacent landowners and citizens' groups – for acts of civil disobedience in order to implement the 1985 Amendments. Challenges to the State's implementation of the federal statute will be heard in State court at State expense.

The siting of low-level waste disposal facilities in Connecticut has already imposed – and will further impose – an enormous burden on the State and its citizens.[7] Each State in the nation is unique with differing topographies, climates, geologic characteristics and population densities.[8] The interplay of the various characteristics in each State may make it ex-

[6] The plans already drawn up by the Connecticut Hazardous Waste Management Service include Site Selection Plan, Comment Response Document to the Draft Site Selection Plan, Draft Public Participation Plan, Draft Site Screening Report, Draft Quality Assurance Plan, Draft Environmental Impact Study Plan, Draft Generic Site Characterization Plan and Low-Level Radioactive Waste Management Updates.

[7] As of December 31, 1991, Connecticut had expended $6,200,000 on the first stages of administering the low-level radioactive waste responsibilities mandated by the 1985 Amendments – selecting a series of possible sites for further testing.

[8] Connecticut is the second most densely populated State in the nation. Three Connecticut towns were identified in June of 1991 by the Hazardous Waste Management Service as potential sites for Connecticut's low-level radioactive waste disposal facility. Forty-three thousand, three hundred and sixty-eight people live in those towns (*Connecticut State Register and Manual*, 1991, Connecticut Secretary of State). The towns selected as possible sites contain some of the only remaining prime farm land in those areas.

tremely difficult, if not impossible, for a particular State to choose a suitable disposal site. Many homeowners in areas which are designated as disposal sites will not be able to sell their homes. Buyers will be unwilling to locate in proximity of potential low-level radioactive waste disposal sites or will be unable to obtain financing from reluctant lending institutions. Affected citizens will have no ability to appeal to their State government, as Congress has pre-empted all State regulatory power while compelling the State itself to provide for disposal of low-level radioactive waste.

The State of Connecticut is only one of at least fourteen States that may be forced to host a facility.[9] Despite the tremendous amount of State resources and revenues expended to comply with the 1985 Amendments, the State's ability to construct and operate a safe disposal site on a timely basis is still uncertain.[10] If a disposal site is not in operation in Connecticut by January 1, 1996, the 1985 Amendments will force the State to "take title" and possession to all the Class A, B and C low-level radioactive waste generated by privately owned utility companies and other entities.

This brief is being filed on behalf of the State of Connecticut by its Attorney General and consent to its filing is not required. U.S. Sup. Ct. R. 37.5.

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[9] *Nuclear Waste – Slow Progress Developing Low-Level Radioactive Waste Disposal Facilities*, p. 12 (January 1992), U.S. General Accounting Office, Report to the Chairman, Committee on Governmental Affairs, U.S. Senate, GAO/RCED-92-61.

[10] The State of Connecticut has already failed to file a complete application with the United States Nuclear Regulatory Commission by January 1, 1992, as required by 42 U.S.C. 2021e(e)(1)(D). This failure subjects generators in the State of Connecticut to the triple surcharge penalty contained in 42 U.S.C. 2021e(e)(2)(D). Those costs will be reflected in the costs of goods which must ultimately be borne by the consumers in the State of Connecticut and elsewhere.

SUMMARY OF ARGUMENT

In 1985, Congress decided to punish those States that were unable to comply with the directives of the Low-Level Radioactive Policy Amendments Act of 1985. Although the States are entirely pre-empted from regulating the generation of low-level radioactive waste by private entities, the 1985 Amendments compel the States to provide for the disposal of all such waste by January 1, 1996 or to take title and possession of the waste and be liable for any damages resulting from that waste. This statute reflects a unique and terribly burdensome encroachment on State sovereignty not envisioned by the framers of the Constitution.

This Court has recognized that there are some "affirmative limits that the constitutional structure might impose on federal action affecting the States," *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 556 (1985). Such limitations are particularly likely where Congress seeks to coerce or compel State regulatory activity rather than extend federal regulation to States. Nevertheless, relying on this Court's decision in *Garcia* for the proposition that State sovereignty is protected by the federal political process itself, the Court of Appeals for the Second Circuit upheld the Low-Level Radioactive Waste Policy Amendments Act of 1985.

This case represents a significant extension of *Garcia* and subsequent Tenth Amendment cases for several reasons.

- Rather than imposing federal regulation on state activities, in an area which may or may not be a "traditional" governmental function, *Garcia*, *supra*, 469 U.S. at 547, Congress here has compelled the State itself to enter the field of disposal of low-level radioactive waste, with draconian consequences if it fails to do so.

- Congress here did not merely extend to State or local governmental entities the same federal requirements that are imposed on private entities, nor did it merely

compel States to impose federal standards or requirements on private businesses. Rather, in the 1985 Amendments, Congress imposed a unique and onerous burden, not on the private or public entities that generate nuclear waste, but on the States themselves.

- A critical element of the statutes upheld in *Garcia* and other cases against Tenth Amendment challenges is notably absent from the 1985 Amendments. In previous federal programs reviewed by this Court, the States retained the ultimate choice to refrain from regulatory responsibilities in an area involving federal regulation or from participation in federal programs. While the choice of not participating in an important federal program may have been an undesirable one for the States, the choice was possible nonetheless. Under the 1985 Amendments, no State can choose to remove itself from the field of low-level radioactive waste. It can neither regulate nor prohibit production of such waste within its borders. It is simply required, by Congressional fiat, to provide for disposal of all Class A, B and C low-level waste produced by private generators and some federal entities or take title to and possession of that waste.

In *Garcia*, the Court concluded that State participation in the federal political process would "ensure that laws that unduly burden the states will not be promulgated." 469 U.S. at 556. However, this is a case in which the federal political process plainly did not protect State sovereignty in the manner envisioned by this Court. Far from being a "paragon[] of legislative success, promoting state and federal comity," *State of New York v. United States*, 942 F.2d 114, 119 (2nd Cir. 1991), here Congress itself opted out of an extremely difficult political and economic problem and imposed it on the States. Having promoted nuclear power through federal policies and having displaced the States from regulating in this field, Congress squarely placed the burden of disposing of this waste on the States themselves, notwithstanding the enormous political and economic consequences for the States and their

localities. If the federal political process is sufficient to satisfy the Tenth Amendment in this case, then the Constitution places no limits on the draconian actions which Congress may wish to take against the States.

ARGUMENT

I. THE 1985 AMENDMENTS EXCEED THE AFFIRMATIVE LIMITS WHICH THE CONSTITUTION IMPOSES ON CONGRESSIONAL ACTION AFFECTING THE STATES.

In 1985, Congress decided to punish those States that were unable to comply with the directives of the Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. §2021b, *et seq.* (the 1985 Amendments). If by January 2, 1996, a State were unable to provide for the disposal of all the low-level radioactive waste generated within its borders, Congress has directed that the ownership of the radioactive waste generated by private entities and some federal facilities would transfer from the waste generators to the State itself. 42 U.S.C. §2021e(d)(2)(c). Upon completion of the compelled transfer of ownership to the State, the State would then either be required to take possession of the radioactive waste or pay damages to those entities that created the waste in the first instance.

This directive, known as the "take title" provision, is unique in American law. Never before has Congress so completely disregarded State sovereignty, subjugating the States, their residents, their treasuries and their sovereign governments to the service of private interests and federal regulatory goals.

Despite the unique and compulsory nature of the 1985 Amendments, the Second Circuit Court of Appeals in *State of New York v. United States*, 942 F.2d 114 (2nd Cir. 1991), determined that the "take title" provision "does not undermine the constitutional structure" nor "does it violate principles of federalism . . ." *Id.* at 121.

The Court based its decision on its determination that the 1985 Amendments were enacted "only after robust debate and a clearly articulated acceptance of NGA [National Governors' Association] and other state-based recommendations." *State of New York v. United States, Id.*, at 120. Relying on this Court's decisions in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), and *South Carolina v. Baker*, 485 U.S. 505 (1988), for the proposition that State sovereignty is protected by the national political process, the Court of Appeals concluded that the 1985 Amendments did not violate the constitution. *New York v. United States, supra*, 942 F.2d at 121.

The Court's decision seriously minimizes the constitutional implications of the "take title" provision and fails to consider this provision's destructive effect on State sovereignty. The Court's conclusions are a direct result of an overly strict interpretation of the standard of review of Congressional Commerce Clause power set forth by this Court in *Garcia* and *Baker*.

A. This Court's Tenth Amendment Decisions Have Preserved Certain Affirmative Limits to Congressional Power Under the Commerce Clause.

In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), this Court reviewed the application of the minimum wage and overtime requirements of the Fair Labor Standards Act to a public mass-transit authority. Dismissing as unsound and unworkable the "traditional governmental function" standard for review of federal actions under the Tenth Amendment developed in *National League of Cities v. Usery*, 426 U.S. 833, (1976) the Court determined that "[s]tate sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." 469 U.S. at 552.

Although *Garcia* ended the judicial search for "*a priori* definitions" or "objective criteria for 'fundamental' elements of state sovereignty . . ." in Tenth Amendment challenges, this Court did not renounce the existence of all substantive restraints on Congressional Commerce Clause power: "Of course, we continue to recognize that the states occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position." *Id.* at 548, 556. However, the particular "factual setting" in *Garcia* demonstrated that "the internal safeguards of the political process have performed as intended" and this Court was not required "to identify or define what affirmative limits the constitutional structure might impose on federal action affecting the states under the Commerce Clause." *Id.* at 556.

In *South Carolina v. Baker*, 485 U.S. 505 (1988), this Court further developed the Tenth Amendment analysis articulated in *Garcia*. *Baker* tested the constitutionality of a change in the Internal Revenue Code removing the federal income tax exemption for interest earned on unregistered long-term bonds issued by private corporations, the United States and State and local governments. The change in the law was intended by Congress to reduce the tax evasion attributable to bearer bonds and the removal of the income tax exemption effectively precluded South Carolina from issuing those bonds. South Carolina filed an original action in this Court claiming that the Tax Code changes violated the Tenth Amendment. South Carolina based its Tenth Amendment claim on its assertion that "the political process failed . . . because Congress had no concrete evidence" to support the new tax legislation and the new law, as a remedy for tax evasion, was "ineffective". *Id.* at 512. This Court rejected that argument: "[N]othing in *Garcia* or the Tenth Amendment authorizes courts to second-guess the substantive basis for congressional legislation . . . Where, as here, the national political *process* did not operate in a defective manner, the Tenth Amendment is not implicated." *Id.* at 513.

Although South Carolina's specific claims were rejected, this Court again noted that "constitutional limitations" on Congressional power "independent of those discussed in *Garcia*" still exist. *Id.* at 513. In this regard, the Court focused its concern on Congressional action which commandeered state regulatory machinery "to compel state regulatory activity" or "to control or influence the manner in which states regulate private parties". *Id.* at 514. After reviewing the tax statute under the principles discussed in *FERC v. Mississippi*, 456 U.S. 742 (1982), the Court determined that the change in the Tax Code did not commandeer the governmental machinery of South Carolina. Instead, the statute merely regulated state activity as part of a generally applicable federal regulatory scheme:

> Any federal regulation demands compliance. That a state wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect.

Id. at 514-515.

In *Garcia*, therefore, this Court specifically noted, without identifying or defining them, the possibilities of "affirmative limits" that "the constitutional structure might impose on federal action affecting the States under the Commerce Clause." *Garcia, supra* 469 U.S. at 556. Again in *South Carolina v. Baker*, 485 U.S. 505, 513 (1988), this Court "left open the possibility" that there exist "constitutional limitations" on Congress' power over the States independent of the national political process. Such limitations are particularly likely where Congress seeks to coerce or compel particular state regulatory activity rather than extend existing federal regulation to States.

B. The Coercive Nature of the 1985 Amendments Destroys the Dignity and Sovereign Power of the States and Exceeds the Affirmative Limits on Congressional Action Preserved in *Garcia* and *Baker*.

This Court has often approved Congressional legislation which directly affected State activities and operations. Legislation applying a generally applicable regulatory scheme to State activities was approved in *Garcia* and *Baker*. Federal statutes that induced States to regulate private entities in a manner which would further federal regulatory goals were sustained in *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981) and *FERC v. Mississippi*, 456 U.S. 742 (1982).[11] The 1985 Amendments, however, differ fundamentally from any of the federal regulatory schemes affecting State interests previously reviewed and approved by this Court. Indeed, the onerous "take title" provision is a unique form of coercion directed exclusively at the States as sovereign entities.

Unlike the Fair Labor Standards Act discussed in *Garcia*, or the Tax Equity and Fiscal Responsibility Act of 1982

[11] In *Hodel* this Court reviewed provisions of the Surface Mining Control and Reclamation Act prescribing performance standards for surface coal mining on steep slopes. Under the Act, if a State did not enact laws implementing federal environmental standards, the Secretary of the Interior would administer the Act's regulatory program for the State. The Court rejected a Tenth Amendment challenge to the Act because the federal requirements governed only the activities of private coal mine operators and the States were free to refrain from participating in the federal regulatory program. 452 U.S. at 283-294.

FERC v. Mississippi considered a Tenth Amendment challenge to provisions of the Public Utility Regulatory Policies Act (PURPA) which required the States to consider specified utility ratemaking standards and imposed certain procedures on State regulatory commissions. In upholding the federal statutes the Court concluded that the States were free to abandon the utility regulatory field and, thus, were not compelled to consider the federal standards or follow the federal procedures set forth in the Act. Congress, through PURPA, simply established "requirements for continued state activity in an otherwise pre-emptible field." 456 U.S. at 769.

examined in *Baker*, the 1985 Amendments do not simply extend a generally applicable federal regulatory scheme to state activities. Under the 1985 Amendments there is no regulatory scheme which applies to private sector corporations, the federal government and the States for the disposal of low-level radioactive waste – the disposal obligation is imposed *only* on States.[12]

Nor is this an instance where Congress has sought to "influence" state regulation of private entities, as did the statutes approved in *Hodel v. Virginia Surface Mining & Reclamation Ass'n., Inc., supra*, and *FERC v. Mississippi, supra*. Instead, the 1985 Amendments compel the States to themselves commence disposing of low-level radioactive waste by January 1, 1996 and, if they do not, to assume the ownership and financial responsibility for the waste generated by private corporations and the federal government.

Unlike the federal statutes reviewed by this Court in *Hodel, FERC v. Mississippi, Garcia*, and *Baker*, the 1985

[12] The Court of Appeals' statement in *State of New York v. United States* that the type of transfer of nuclear waste ownership mandated by the 1985 Amendments is "not uncommon" has no basis in fact. The take-title provision has no relation to the transfers of title to nuclear waste "usually effected by contract". 942 F.2d at 120. The Court's misplaced reliance on *General Elec. Uranium Corp. v. United States Dep't. of Energy*, 764 F.2d 896 (D.C. Cir. 1985) and *Commonwealth Edison Co. v. Allied-General Nuclear Servs.*, 731 F.Supp. 850 (N.D. Ill. 1990) reflects its confusion between the voluntary contractual arrangements discussed in those cases and the compelled transfer of title by Congressional edict contained in the 1985 Amendments.

The Court in *General Elec. Uranium*, 764 F.2d at 898, specifically noted the voluntary nature of the contractual arrangements authorized under Section 302 of the Nuclear Waste Policy Act. Likewise, the transfer discussed in *Commonwealth Edison*, 731 F.Supp. at 856, was a purely voluntary business arrangement: "It [Allied-General Nuclear Services] further promised, in the latter event (that is, activation of the Facility Contingency Plan), to take title to the spent nuclear fuel that Edison tendered for reprocessing."

The State of Connecticut has not volunteered to acquire, possess and dispose or pay for the low-level radioactive waste generated within its borders by private corporations and the federal government.

Amendments reflect Congressional action in a totally new and different direction – compelling State action in a field the States have not previously entered and in which private entities are not subject to the same Congressional compulsion. The 1985 Amendments do more than commandeer "the legislative process of the states by directly compelling them to enact and enforce a regulatory program." *Hodel v. Virginia Surface Mining & Reclamation Ass'n., Inc., supra*, 452 U.S. at 288. Through the take-title provision, Congress has commandeered the States themselves, subjugating the States, their machinery of government and their treasuries to private waste generators.[13]

This Court has never sanctioned the "compelled exercise" of a State's "sovereign powers." *FERC v. Mississippi, supra*, 456 U.S. at 769.[14] To the contrary, this Court has recognized choice as an essential element of State sovereignty.

[13] The 1985 Amendments' requirement that States own and possess radioactive waste is also far more intrusive on State dignity and power than the EPA's Clean Air Act regulations reviewed by three Courts of Appeal in *Maryland v. EPA*, 530 F.2d 215 (4th Cir. 1975), vacated and remanded *sub nom. EPA v. Brown*, 431 U.S. 99 (1977); *Brown v. EPA*, 521 F.2d 837 (9th Cir. 1975), vacated and remanded, 431 U.S. 99 (1977); *District of Columbia v. Train*, 521 F.2d 971 (D.C. Cir. 1975), vacated and remanded *sub nom. EPA v. Brown*, 431 U.S. 99 (1977). In those cases, the regulations authorized the EPA Administrator, in the event a State failed to submit an adequate air pollution control plan, to develop a detailed federal plan and compel States to implement it by enacting legislation and appropriating funds. The three courts of appeals declined to construe the Act as allowing EPA to compel State implementation of federal plans because of the serious constitutional questions which the regulations raised. *See Maryland v. EPA*, 530 F.2d at 228; *District of Columbia v. Train*, 521 F.2d at 983-987; *Brown v. EPA*, 521 F.2d at 832-837.

[14] Under the Spending Clause, Congress may "attain broad policy objectives not thought to be within Article I's 'enumerated legislative fields', . . . through the use of . . . the conditional grant of federal funds." *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) quoting *United States v. Butler*, 297 U.S. 1, 65 (1936). Nevertheless, this Court has noted that constitutional limitations exist on Congress' use of financial inducements which compel State action:

(continued)

> The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else – including the judiciary – deems State involvement to be.

Garcia, supra, 469 U.S. at 546.

State choice necessarily entails the converse of the above statement – the freedom to choose not to engage in an activity. This Court has repeatedly upheld federal statutes that affected State interests, in part because they maintained the States' freedom to refrain from the activity in which Congress authorized State participation.[15] No State, however, can with-

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[14] *(continued)*

> Our decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which "pressure turns into compulsion." *Steward Machine Co. v. Davis, supra,* 301 U.S., at 590, 57 S.Ct., at 892. *South Dakota v. Dole, supra,* 483 U.S. 211 (1987).

If coercive legislation under the Spending Clause is subject to limitations, coercive legislation formulated under the guise of commerce regulation is prohibited: "constitutional limitations on Congress when exercising its spending power are less exacting than those on its authority to regulate directly." *South Dakota v. Dole, Id.* at 209.

[15] *See Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.,* 452 U.S. 264 (1981) (Surface Mining Control and Reclamation Act allows States to refrain from regulatory responsibilities in favor of federal regulatory agency); *Federal Energy Regulatory Com'n. v. Mississippi,* 456 U.S. 742 (1982) (States may decline to accept conditions imposed by Public Utilities Regulatory Policies Act by abandoning regulation of the field); *United Transportation Union v. Long Island R. Co.,* 455 U.S. 678 (1982) (States can avoid application of the Railway Labor Act by declining ownership of an interstate railway); *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 581 (1985) (State can avoid application of the Fair Labor Standards Act by not requiring State employees to work overtime); *South Carolina v. Baker,* 485 U.S. 505 (1988) (States may avoid issuing registered bonds under Tax Equity Fiscal Responsibility Act by foregoing favorable tax treatment afforded registered bonds).

draw from or alter either the federally regulated production of nuclear power within its borders or the low-level radioactive waste disposal program imposed by Congress.

For many years Congress encouraged the development of nuclear power as a means of securing a safe, dependable, domestic source of electrical generation. *Vermont Yankee Nuclear Power v. Natural Resources Defense Council*, 435 U.S. 519, 557 (1978). Today, Connecticut is host to four nuclear powered electrical generating stations, co-owned by a consortium of utility companies located in different states and providing electricity on an interstate transmission grid to all of New England. The nuclear power plants account for virtually all of the low-level radioactive hazard created in this State.[16] The State may neither preclude nor regulate the generation of low-level radioactive waste at these privately owned nuclear power plants. 42 U.S.C. §2021(c).[17]

The inability of a State to prohibit or limit generation of low-level radioactive waste – the source of the underlying problem – accentuates the inequity of thrusting title, possession, liability and responsibility for disposal upon the States. This inequity is compounded by the fact that Congress also required the States to be responsible for disposal of and liable for, certain low-level radioactive waste generated by the agencies of the Federal Government (42 U.S.C. §2021c(2)(1)(B)).

The 1985 Amendments, therefore, leave the States with no real choices. The States cannot withdraw from the field. They cannot restrict the generation of low-level radioactive

[16] For example, in Connecticut 99.9 percent of the low-level radioactive hazard is produced by nuclear generating stations. *Low-level Radioactive Waste Management in Connecticut – 1990*, (1992) Connecticut Hazardous Waste Management Service.

[17] "Paragraph (3) emphasizes the continued Federal preemption of authority to regulate Atomic Energy Act materials for radiological health and safety." Senate Energy and Natural Resources Committee, Low-Level Radioactive Waste Policy Amendments Act of 1985, S.Rep. No. 199, 99th Cong., 1st Sess. p. 9 (1985).

waste and, even if they are not in the waste disposal business, they must start disposing of such waste before January 1, 1996. If a State waste disposal facility is not in place by that date the State, by Congressional edict, will own and possess that waste. The forced acquisition of title by the States to privately generated low-level radioactive waste is no less an anathema to State sovereignty than a directive by Congress that States relocate their seats of government if a low-level radioactive waste disposal site is not chosen by January 1, 1996. That Congress would have such powers under the Constitution "would not be for a moment entertained" by this Court. *Coyle v. Smith*, 221 U.S. 559, 565 (1911).

Hence, the 1985 Amendments direct and compel State action in a manner never before approved – or even considered – by this Court. If the 1985 Amendments do not violate the Tenth Amendment then, contrary to this Court's careful statements in *Garcia*, there are no affirmative limits to Congressional power under the Commerce Clause. If the 1985 Amendments are allowed to stand, similar coercive mandates could be employed by Congress in other areas: States could be required to assume the bad loans or financial losses of failing banks located within their States or to own and possess all hazardous or toxic waste generated by private companies operating within a State's borders. This Court in *Garcia* never intended to sanction the destruction of State sovereign interests; on the contrary, it made clear that some structural Tenth Amendment limits remain – limits that the 1985 Amendments far exceed.

II. THE NATIONAL POLITICAL PROCESS FAILED TO PROTECT THE STATES FROM UNDULY BURDENSOME FEDERAL REGULATION, AS ASSUMED BY THIS COURT IN *GARCIA*.

In *Garcia*, this Court determined that the States must look to the "procedural safeguards inherent in the structure of the federal system" for protection against impairment of

their sovereign interests. *Garcia, supra*, 469 U.S. at 552. According to this Court, "[t]he political process ensures that laws that unduly burden the States will not be promulgated." *Id.* at 556. Of course, the Court recognized that the national political process did not provide a 100 percent guarantee against unconstitutional Congressional action – "failings in the national political process" were "possible." *Id.* at 554. The Court, however, was not prepared to "identify and define what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause" (*Id.* at 556) by "conjuring up horrible possibilities that never happen in the real world." *Id.* at 556, quoting *New York v. United States*, 326 U.S. 572, 583 (1946).

In reviewing the 1985 Amendments, the Court of Appeals adopted a totally inflexible Tenth Amendment analysis and determined that under *Garcia*, the Constitution was necessarily satisfied because the federal political process carried the 1985 Amendments through Congressional debate and vote to their final enactment into public law: "The political process ensures that laws that unduly burden the states will not be promulgated. *Garcia*, 469 U.S. at 556." *State of New York v. United States, supra*, 942 F.2d at 120. Despite the unique nature of the take title provision, the Court of Appeals did not inquire – as this Court itself did in *South Carolina v. Baker* – whether Congress crossed the line, however fine it may be, that separates the proper exercise of Commerce Clause power from unconstitutional intrusion on State sovereignty.

In its decision, the Court of Appeals reviewed the history of the 1985 Amendments and accurately noted that in both the Low-Level Radioactive Waste Policy Act of 1980 and the 1985 Amendments "Congress acted only after robust debate and a clearly articulated acceptance of NGA [National Governor's Association] and other state-based recommendations." *State of New York v. United States, supra* 942 F.2d 120. However, when viewed in historical context, the legislative process was far from a "paragon" of constitutional "success." *Id.* at 119. Instead, although the States' interests were consid-

ered and many of the States' suggestions adopted, in the final analysis Congress acted in a manner which it knew was punitive to the States[18] and constituted an unprecedented assault on State dignity and power.[19]

The history of Congress' action on the disposal of low-level radioactive waste demonstrates that the political process did not protect States' sovereign interests in the manner contemplated by *Garcia*. It was Congressional action which encouraged the development of nuclear power and the proliferation of nuclear generating stations in this country. *Vermont Yankee Nuclear Power Company v. Natural Resources Defense Council*, 435 U.S. 519 (1978). "There is little doubt that a primary purpose of the Atomic Energy Act was, and continues to be, the promotion of nuclear power." *Pacific Gas & Electric v. State Energy Resources Commission*, 461 U.S. 190, 221 (1983). The federal government has also assumed authority "through its power to regulate interstate commerce and provide for the national defense and general welfare" over "the use of nuclear energy." *Simmons v. Arkansas Power & Light Co.*, 655 F.2d 131, 135 (8th Cir. 1981).

Low-level and high-level radioactive wastes are by-products of nuclear energy and Congress correctly perceived

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[18] "It is a very far-reaching, difficult, and punitive provision, but we meant it to be precisely that." 131 Cong. Rec. S.18113 (daily ed. Dec. 19, 1985) (statement of Senator Johnston).

[19] "Certainly, the Congress, as is each State, is free to exercise its powers to designate sites and to construct and operate low-level waste disposal facilities. But for Congress to mandate that the States must undertake the burden of providing waste facilities without any provision for federal funding or face obligations, liabilities, or other sanctions imposed under federal law may raise Tenth Amendment problems. There does not appear to be pertinent judicial precedent that has upheld in the face of Tenth Amendment objections a federal mandate as intrusive on State sovereignty as the one at issue here." *Constitutional Issues Raised By the Imposition of Liabilities on the States Under a Proposed Amendment to the Low-Level Radioactive Waste Policy Act of 1980*, p. 5, Congressional Research Service, Report to the House Committee on Energy and Commerce, Subcommittee on Energy Conservation and Power dated December 16, 1985.

the disposal of such waste to be a federal problem. *See Pacific Gas & Electric v. State Energy Resources Commission, supra.* In 1980 legislative steps were taken to deal with the issue of low-level radioactive waste. However, when the 1980 legislation did not work in the way it was intended, Congress – with time running out – took an additional, unprecedented step to coerce the States into solving the national low-level radioactive waste disposal problem. The national problem became a State responsibility. 42 U.S.C. §2021c(a)(1).

None of the early drafts of the 1985 Amendments Act, subject to months of review and hearings, contained the take-title provision[20] On Tuesday, December 17, 1985, in the closing days of the session before Christmas recess, Senator Thurmond provided Congress with the take-title provision in the form of a "Dear Colleague" letter. Senators Thurmond and Johnston then formally proposed on Thursday, December 19, 1985, an amendment containing the take-title provision to the bills being considered by the House and Senate.[21] With no new facilities constructed and threatened with the closure of the three existing disposal sites, the 1985 Amendments Act – with the take-title provision – passed both Houses of Congress on December 19, 1985.[22]

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[20] The legislative history of the 1985 Amendments indicates that "[N]o Senate Report was submitted with this legislation." Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. No. 99-240, 1985 U.S. Code Cong. & Admin. News (99 Stat.) 2974, 2975. In fact, it does not appear that any of the House reports accompanying H.R. 1083 (the House Bill which initiated the legislative process on the 1985 Amendments) or related House or Senate reports discussed the take title provision.

[21] [T]oday, I am offering a complete substitute to H.R. 1083, the Low-level Radioactive Waste Policy Amendments Act of 1985 . . . The substitute that is offered today is similar to the one that I circulated earlier this week with a Dear Colleague letter . . . This substitute is strongly supported by the Governors of the sited States – South Carolina, Washington and Nevada. 131 Cong. Rec. S.18,105-6 (daily ed. Dec . 19, 1985) (statement of Senator Thurmond).

[22] ". . . [G]iven the lack of time to adequately flush out the weaknesses inherent in this package, and given the sited-State Governors' unconditional

(continued)

In approving the "take title" provision, Congress ignored "the special and specific position in our constitutional system" occupied by the States, transforming the States into agents of the federal government and private nuclear waste generators. The internal safeguards of the political process envisioned by the Constitution to protect State sovereignty did not work. *Garcia, supra* 469 U.S. at 556. Instead, in this instance, the federal political process was specifically employed to shift directly to the States a federal responsibility in a difficult political and regulatory area. One of the "horrible possibilities that never happen in the real world," happened here. *New York v. United States*, 326 U.S. 572, 583 (1946) (quoted in *Garcia*, 469 U.S. at 556).

The process-based protections relied on by this Court in *Garcia* failed because the "[m]embers of Congress . . . elected from the various States" voted, not as representatives of the States, but as "Members of the Federal Government." *Garcia*, 469 U.S. at 564-565 (Powell, J. dissenting).

> One can hardly imagine this court saying that because Congress is composed of individuals, individual rights guaranteed by the Bill of Rights are amply protected by the political process. Yet, the position adopted today is indistinguishable in principle. The Tenth Amendment also is an essential part of the Bill of Rights . . .

Garcia, 469 U.S. at 565 n. 8 (Powell, J., dissenting).[23]

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[22] *(continued)*
endorsement for such an approach, we have no choice but to move this legislation forward at this time." Cong. Rec. S.18,114 (daily ed. Dec. 19, 1985) (statement of Senator McClure).

[23] Realizing the draconian nature of the take title provision, Congress neither imposed a take title provision nor any time frames upon Federal agencies required to develop disposal capacity (42 U.S.C. § 2021c(b). The United States Department of Energy estimates that disposal capacity for low-level radioactive waste for which it is responsible shall not be available until
(continued)

Responsibility for disposal of low-level radioactive waste entails not only political and legal liability but also horrendous economic burdens. The search for an appropriate site for a waste disposal facility, the testing of potential sites, the displacement of homeowners, farmers, and parkland, and the construction of a proper and safe facility is an enormously complicated, expensive, technologically difficult and politically explosive process. Imposition of that responsibility on the States requires the States' government to exercise judicial, executive and legislative powers to fulfill federal policies, encroaching on the limits of proper political responsibility and shielding Congressional policy makers from accountability for unpopular decisions. *See* Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L.Rev. 1 (1988). While the States sought to participate in the solution to the low-level radioactive waste disposal problem throughout the development of the 1980 and 1985 legislation, the States did not agree to subjugate themselves, their residents or their treasuries to a process for resolving a major national problem that sanctioned Congress' evasion of responsibility.

The federal political process, through the coercive nature of the 1985 Amendments, upset the federal-state relationship established by the Constitution.

> Perhaps the principal benefit of the federalist system is a check on abuses of government power. "The 'constitutionally mandated balance of power' between the states and the federal government was adopted by the Framers to ensure the protection of 'our fun-

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[23] *(continued)*
the year 2010. *Report to Congress in Response to Public Law 99-240, 1988 Annual Report on Low-Level Radioactive Waste Management Progress*, Section 4.4.5, p. 172, U.S. Department of Energy (1989); See also *Nuclear Waste – Slow Progress Developing Low-Level Radioactive Waste Disposal Facilities*, p. 25 (January 1992), U.S. General Accounting Office, Report to the Chairman, Committee on Governmental Affairs, U.S. Senate, GAO/RCED-92-61.

damental liberties.'" *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242, 105 S.Ct. 3142, 3147, 87 L.Ed.2d 171 (1985) quoting *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 572, 105 S.Ct. 1005, 1028, 83 L.Ed.2d 1016 (1985) (Powell, J., dissenting).

Gregory v. Ashcroft, 111 S.Ct. 2395, 2399 (1991).

As this Court recently reiterated in *Gregory v. Ashcroft*, *supra*, 222 S.Ct. at 2399, one of the fundamental principles of government is the Constitutional establishment of ". . . a system of dual sovereignty between the states and the federal government." The dual system of sovereigns embodied in the Constitution reflected the framers' distrust of an omnipotent, federal government.

> The powers delegated by the proposed constitution to the federal government are few and defined. Those which are to remain in the state governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several states will extend to all the objects which, in the ordinary course of affairs, concern lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the state. The *Federalist No. 45*, pp. 292-293 (C. Rossiter ed. 1961) (J. Madison).

The 1985 Amendments are inconsistent with the constitutional balance of powers between the States and the federal government. The coercive imposition on the States of congressional policies that entail political and economic liabilities threatens the fundamental concept of separate sovereign entities coexisting under a constitutional framework. The 1985 Amendments are destructive of State sovereignty and are the result of the national political process failing to protect the

"States as States". *Garcia's* strict standard for review of claimed Tenth Amendment violations must be "tailored" in this case "to compensate" for Congress' failure to respect State sovereignty.

CONCLUSION

The 1985 Amendments should be declared unconstitutional.

Respectfully submitted,

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